ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL
FILE

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

To: The Commission

COMMENTS

OF

WILLIAMS TELECOMMUNICATIONS GROUP, INC.

March 27, 1992

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TABLE OF CONTENTS

SUMMARY

Congress implicitly ratified the Commission's regulatory scheme for nondominant carriers by amending the Communications Act and leaving forbearance undisturbed. These amendments include three recent revisions to the Act's general tariff provisions and the adoption of tariff requirements for operator services providers, requirements that would have been redundant if Congress viewed forbearance as unlawful. The filing of tariffs by AT&T ensures that customers can obtain tariffed services and that other carriers cannot, in the long run, charge excessive or unreasonable rates.

The Supreme Court's decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc. does not require abandonment of tariff forbearance. In fact, Maislin supports the principle that Congress can implicitly ratify otherwise doubtful legal interpretations.

If forbearance is invalid, then all interexchange common carriers must file tariffs. Intercarrier agreements would not be affected by the repeal of the forbearance rules and other agreements should be allowed to remain in effect during a transition period. If the Commission concludes it is legally compelled to end forbearance, it should streamline and reform the tariff rules for nondominant carriers.

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Williams Telecommunications Group, Inc. ("WilTel"), on behalf of its common carrier operating subsidiaries, has prepared the following comments in support of the Commission's application of forbearance regulation to nondominant carrier tariffs.

I. INTRODUCTION

Section 203 of the Communications Act states that interstate services must be provided pursuant to tariffed rates, terms and conditions.[1] The Commission's forbearance of this tariff filing requirement as applied to nondominant interexchange carriers is lawful for two reasons: (1) Congress has implicitly ratified such forbearance and (2) the filing of tariffs by AT&T ensures that customers have the ability to obtain tariffed services and that other IXCs cannot, in the long run, charge excessive or unreasonable rates. Thus, although the Commission cannot refuse to accept

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[1] 47 U.S.C.A. § 203 (West Supp. 1991).

tariffs filed by nondominant IXCs[2] and cannot waive the tariff requirements for dominant carriers,[3] it can forbear from requiring nondominant carriers to file tariffs.

II. TARIFF FORBEARANCE IS LAWFUL

A. Congressional Ratification

When Congress is aware of an agency's interpretation of its authority and refuses to overturn the interpretation as it revises related portions of the agency's organic act, the interpretation is implicitly ratified by Congress. An agency position that was initially wrong can, with the passage of time and with Congressional acquiescence, become lawful.

Consider, for example, Bob Jones University v. United States.[4] In reviewing a controversial IRS ruling, the Court found that:

1. For a dozen years Congress was "acutely aware" of the IRS position.[5]

2. Congress failed to modify the IRS position even though it enacted related legislation.[6]

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[2]MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[3]See Subsection II.B, infra.

[4]461 U.S. 574 (1983).

[5]Id. at 599; see also Kirkhuff v. Nimmo, 683 F.2d 544, 549 (D.C. Cir. 1982) ("deference is due to an agency's construction of a statute when Congress becomes aware of, and fails to correct, that construction.")

[6]Bob Jones, 461 U.S. at 499; see also Brown v. United States, 890 F.2d 1329, 1338 (5th Cir. 1989) (strong evidence of Congressional approval of a longstanding interpretation by IRS exists when Congress has adopted several amendments to

3. By enacting related legislation, "Congress affirmatively manifested its acquiescence in the IRS policy."[7]

Tariff forbearance has also been ratified by congressional acquiescence. As was true in Bob Jones: (1) the ruling being considered has been in effect for several years,[8] (2) Congress has amended the Communications Act while leaving the forbearance doctrine in place,[9] and (3) Congress has "affirmatively manifested its acquiescence in" the policy being reviewed, by enacting the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA").[10]

In analyzing the impact of TOCSIA, Congress stated that the obligation to file informational tariffs would increase the paperwork burdens faced by OSPs.[11] The Senate Report acknowledged the Commission's decision "to 'forbear' from regulating the rates of 'nondominant' carriers,"[12] while the

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Internal Revenue Code but has not amended the interpreted statutory provision).

[7]Bob Jones, 461 U.S. at 601.

[8]Tariff forbearance has been in effect since 1982, and, consequently, predates AT&T's divestiture of the BOCs.

[9]These changes include three recent amendments to Sections 203 and 204, the sections that set forth the tariff requirements and the procedures for reviewing tariff changes. Pub. L. 101-396, § 7, 104 Stat. 850 (Sept. 28, 1990); Pub. L. 101-239, Title III, § 3002(b), 103 Stat. 2131 (Dec. 19, 1989); Pub. L. 100-594, § 8(b), 102 Stat. 3023 (Nov. 3, 1988).

[10]Pub. L. 101-435, 104 Stat. 987 (Oct. 17, 1990), codified at 47 U.S.C.A. § 226 (West Supp. 1991).

[11]S. Rep. No. 439, 101st Cong., 2nd Sess., at 9 (1990), reprinted in 1990 U.S. Cong. & Admin. News 1577, 1585.

[12]Id. at 3 n.10, 1990 U.S. Cong. & Admin. News, at 1579 n.10.

House Report stated that the Commission "currently does not regulate" OSP rates,[13] and that informational tariffs need not comply with all of the Commission's Part 61 requirements.[14] By adopting the informational tariff requirement, Congress intended to carve out an exception to forbearance regulation. By enacting requirements different from and less stringent than those in Section 203, the legislature recognized the existence of forbearance and declined to overturn it.

TOCSIA allows the Commission to waive the informational tariff filing requirements beginning in October 1994.[15] The waiver can be issued only if the consumer-protection goals of TOCSIA have been achieved.[16] Those who contend that forbearance is unlawful must assume either that: (1) OSPs must file two separate tariffs to satisfy the obligations of Sections 203 and 226(h) or (2) when the Commission finds that TOCSIA's objectives have been achieved, then OSPs will be relieved of the obligation to file the informational tariff, but will instead be obligated to file the more burdensome Section 203 tariff. In other words, unless Congress has implicitly ratified forbearance, it must be presumed to have created pointless duplication or to have imposed less stringent regulation until the OSP industry no longer

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[13]H.R. No. 213, 101st Cong., 1st Sess., at 4 (1989).

[14]Id. at 16.

[15]47 U.S.C.A. § 226(h)(1)(B) (West Supp. 1991).

[16]Id. § 226(h)(1)(B)(i).

threatens consumer interests, at which time additional regulation will be imposed.

If nondominant OSPs are, as a result of TOCSIA, required to file informational tariffs in lieu of otherwise mandatory Section 203 tariffs, then TOCSIA reduced tariff regulation of the operator service industry; Congress, however, clearly intended the opposite result.[17] On the other hand, if OSPs must file an informational services tariff and a Section 203 tariff, then Congress must be deemed to have adopted the TOCSIA tariff requirement as a meaningless exercise in redundancy. By enacting TOCSIA, Congress recognized and ratified forbearance.

The Cable Communications Policy Act of 1984,[18] another post-forbearance statute, allows states or the Commission to require the filing of informational tariffs.[19] One of the purposes of Subsection 541(d) is to allow the Commission to "require cable operators to file informational tariffs for services that are jurisdictionally interstate when offered by a common carrier."[20]

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[17]See Pub. L 101-435, § 2(10), 104 Stat. 987 (Oct. 17, 1990) ("a combination of industry self-regulation and government regulation is required to ensure that competitive operator services are provided in a fair and reasonable manner.").

[18]Pub. L 98-579, § 2, 98 Stat. 2780 (Oct. 30, 1984), codified at 47 U.S.C. §§ 521-559 (1988).

[19]47 U.S.C. § 541(d)(1988).

[20]H.R. No. 934, 98th Cong., 2nd Sess., at 61 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4698.

Twice in the last decade, Congress has adopted tariff-filing provisions for the communications industry; on three occasions since 1988, it has amended Sections 203 or 204.[21] While making these changes, Congress has left forbearance intact. Even if forbearance was unlawful in 1982, it has the implicit approval of Congress in 1992.

B. "Umbrella" Regulation

A paper issued by the Commission's Office of Plans and Policy concluded that:

> [A] crucial element of the legal argument supporting the Commission's decision to forbear from regulating AT&T's nondominant competitors was that AT&T's rates remained subject to direct Commission regulation.[22]

As long as AT&T is required to file tariffs, consumers have the ability to obtain interstate services in the manner contemplated by Section 203. AT&T's rates, in effect, establish maximum charges for interstate services, insuring that other carriers cannot charge excessive rates.[23]

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[21]See note 9, supra.

[22]Haring & Levitz, Office of Plans and Policy, F.C.C., What Makes the Dominant Firm Dominant?, 18-19 (April 1989) (footnote omitted). The OPP paper, far from supporting the views of nondominant IXCs, strongly advocated reduced regulation of AT&T. The pro-AT&T tone of the paper lends special credibility to its conclusion that forbearance is dependent upon continued regulation of AT&T.

[23]This would not be true only if consumers have limited choices or information, as occurred in the provision of operator services. The voluntary adoption of standards by the operator services industry, the enactment of TOCSIA and Commission initiatives have resolved problems in the only area where these conditions have existed.

Congress has recognized that the Commission's forbearance has been limited to nondominant carriers.[24] Even though this "umbrella" rationale for forbearance might not, without more, survive judicial review,[25] it provides an analytical basis for congressional ratification; combined with Congress's implicit acquiescence in and approval of forbearance, this theory provides a sufficient legal foundation for the Commission's policies.

C. Forbearance Survives Maislin

Courts often defer to Congress when the evolution of legal thought makes existing precedent obsolete. For example, in Flood v. Kuhn,[26] the Supreme Court recognized the inconsistency of applying the antitrust laws to football and basketball, but not to baseball. Nonetheless, it deferred to Congress's implicit ratification of baseball's antitrust exemption, holding that any inconsistency was of long standing and should be remedied by Congress, not the Court.[27] If the highest court in the land defers to implicit congressional

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[24]S. Rep. No. 439, 101st Cong. 2nd Sess., at 3 n.10 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 1577, 1579 n.10.

[25]But see Permian Basin Area Rate Cases, 390 U.S. 747, 784-87 (1968) (Federal Power Commission properly exempted small gas producers from statutory obligations).

[26]407 U.S. 258 (1972).

[27]Id. at 284; cf. Hilton v. South Carolina Public Railways Commission, 116 L. Ed. 2d 560 (1991) (stare decisis has added force when public has relied on existing rulings).

ratification, then the Commission should not hesitate to do so.[28]

Because Congress has ratified the Commission's regulatory scheme, the conclusion reached in Maislin Industries, U.S., Inc. v. Primary Steel, Inc.[29] with respect to motor carriers cannot be extended to overturn tariff forbearance. If Maislin applies to the instant controversy, it is only for the proposition that:

> ". . . Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme . . . and . . . Congress did not see fit to change it when Congress carefully reexamined this area of the law . . . ."[30]

Further, in Maislin the Court noted that Congress created an exception to the filed rate doctrine for household goods carriers. This, the Court found, demonstrated "that Congress was aware of, but has elected not to eliminate, as applied to other motor common carriers, the general [tariff adherence and filing] requirements."[31]

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[28]While Congress has implicitly ratified the Commission's conclusion that forbearance is lawful, the Commission retains the ability to reinstate traditional tariff and entry/exit regulation. Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefor, Second Report & Order, 91 F.C.C.2d 59, 70 (1982) ("we retain the power to reimpose certification and tariffing requirements should the need arise.").

[29]111 L. Ed. 2d 94 (1990).

[30]111 L. Ed. 2d at 114 (quoting Square D Co. v. Niagara Frontier Traffic Bureau, Inc., 476 U.S. 409, 420 (1986)). In Square D, the Court referred to judicial decisions that had been in place for fifty years. Nevertheless, the language quoted in Maislin supports the principle that Congress can ratify statutory interpretations that were of doubtful validity when adopted.

[31]111 L. Ed. 2d at 114 n.15.

With respect to telecommunications tariffs, Congress created an exception to the Commission's forbearance regulation; it narrowed the scope of an exemption, rather than, as it did with motor carriers, create the same type of exemption for some carriers that the Interstate Commerce Commission attempted to create for all motor carriers. To paraphrase Maislin, when Congress enacted TOCSIA, it was aware of, but elected not to eliminate, as applied to non-OSPs, tariff forbearance.

III. ALL NONDOMINANT COMMON CARRIERS MUST FILE TARIFFS IF FORBEARANCE IS UNLAWFUL

If forbearance violates the Communications Act as applied to one of AT&T's competitors, then all interexchange common carriers must file tariffs. The "definitional" approach to forbearance, by which certain carriers (e.g., resellers) are deemed not to be common carriers, has long been abandoned as a justification for deregulation and that dubious doctrine should not be revived.[32] The Commission can, of course, establish different filing requirements for different services or different classes of carriers.[33]

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[32]See generally Note, Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition, 1987 Duke L. J. 501.

[33]See Section V, infra.

IV. EXISTING AGREEMENTS SHOULD NOT BE AFFECTED BY PROSPECTIVE REVOCATION OF FORBEARANCE

A. Intercarrier Agreements

Even if the Commission concludes that nondominant carriers must file tariffs, it is clear that some service arrangements need not be set forth in those tariffs. Sections 201(a) and 211 of the Communications Act[34] indicate that carriers can enter into untariffed contractual relationships with other carriers. In Bell Telephone Co. of Pennsylvania v. FCC,[35] the court found that Section 211, by implication, allows carriers to enter into binding intercarrier contracts. This reasoning is particularly persuasive given language quoted from the leading pre-Maislin Supreme Court decision on untariffed contracts: "[B]y requiring contracts to be filed with the Commission, the [Natural Gas] Act expressly recognizes that rates to particular customers may be set by individual contracts."[36]

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[34]47 U.S.C. § 201(a) (Commission can establish division of revenues between carriers) (1988); id. § 211 (carriers required to file copies of contracts with other carriers).

[35]503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

[36]United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 338 (1956) (as quoted in Bell Telephone, 503 F.2d at 1278). The Mobile-Sierra doctrine, enunciated in Mobile and a companion case, has co-existed with the filed rate doctrine for twenty-five years and there is no reason to suppose that the principles set forth in Mobile were affected by Maislin. The Mobile-Sierra doctrine prevents regulated companies from unilaterally altering contract rates through tariff filings, to the extent the statutes contemplate use of contracts.

Even if tariff forbearance were unlawful, "contract filing forbearance," as applied to nondominant carriers, falls within the Commission's authority under Section 211(b).[37]

B. Other Agreements

Assuming that service arrangements with non-carriers should be provided pursuant to tariff, it does not follow that existing contracts must or should be voided. Instead, the Commission should apply equitable principles or analogous doctrines to reduce the impact of the "detrimental reliance" placed on forbearance by the industry and consumers.[38]

Contracts in force as of the effective date of any Commission order should remain in effect for at least one year, except those which expire during that twelve-month period. After that time, carriers should be allowed to maintain the effectiveness of longer-term agreements by filing the prices and contract provisions in tariff form.

V. THE TARIFF RULES SHOULD BE REFORMED IF FORBEARANCE IS ABANDONED

If the Commission concludes it is legally compelled to end tariff forbearance, it should further streamline and reform the tariff rules for nondominant carriers. The tariff

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[37]See Amendment of Section 43.51, et seq., Notice of Proposed Rulemaking, 102 F.C.C.2d 531 ¶¶ 9-11 (1985); Amendment of Section 43.51, et seq., Report & Order, 1 F.C.C. Rcd. 933 ¶¶ 8-10 (1986); 47 U.S.C. § 211(b) (1988).

[38]Cf. Brown v. Board of Education, 349 U.S. 294, 300 (1955) (mandating application of equitable principles in implementing school desegregation).

filing intervals should be designed to allow rapid response to market conditions and unimpeded introduction of new services. If, however, the Commission has a legal obligation to require nondominant IXCs to file tariffs, then it also must provide some opportunity for the public to challenge the lawfulness of those tariffs. The Commission should issue a further notice of proposed rulemaking to reconcile these competing goals, if it discards forbearance.[39]

The Commission could ease regulatory burdens and promote the public interest by eliminating some of the procedural restrictions on nondominant IXC tariff filings. Among options the Commission could consider are: (1) allowing industry groups to propose model tariffs (without pricing), the provisions of which could be incorporated by reference in the tariffs of nondominant carriers; and (2) allowing cross references between tariffs. The Commission should also reduce the filing fees for nondominant carrier tariffs to reflect the nominal burden such filings create.

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[39]One option the Commission could consider would be to shorten the minimum interval between the filing date and the effective date if a nondominant carrier certifies that: (1) all existing customers that could be adversely affected have been notified of the proposed change; or (2) no customers will be adversely affected. By definition, nondominant carrier filings will have no substantial effect on competitors or on the general level of competition; consequently, providing meaningful notice to non-customers would not substantially further the goals of the Communications Act.

VI. CONCLUSION

Neither AT&T nor any other party sought judicial review of permissive forbearance.[40] The Maislin case and AT&T's desire to engage in a belated collateral attack do not require abandonment of that congressionally endorsed policy.

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[40]May, Commentary: MCI Telecommunications Corporation v. FCC: A Roadblock or Merely a Bump on the Road to Deregulation?, 36 Admin. L. Rev. 51, 52 n.8 (1986).

CERTIFICATE OF SERVICE

I, Pamela S. Neff, do hereby certify that copies of the foregoing **Comments of Williams Telecommunications Group, Inc.** were sent March 30, 1992, by first class mail, postage prepaid, to the following:

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